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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS ANTHONY ESCUTIA,

Defendant and Appellant.

F047737

(Super. Ct. No. F04601228-0)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Charles A. French and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant, Marcos Anthony Escutia, was convicted by a jury of second degree robbery and assault with a deadly weapon, a knife. (Pen. Code, §§ 211 and 245, subd.

(a)(1).) The jury further found that appellant personally used a deadly weapon, a knife, in the commission of the robbery. (Pen. Code, § 12022, subd. (b)(1).)

Appellant challenges the assault with a deadly weapon conviction and personal use of a deadly weapon finding on two grounds. According to appellant, he could not be convicted of assault with a deadly weapon because it is a necessarily included offense of robbery with a personal use of a deadly weapon enhancement. Appellant further argues that there was insufficient evidence to establish that he personally used a knife in the commission of the robbery and assault.

Additionally, appellant contends that both convictions must be reversed because, while permitting him to impeach the victim with evidence of conduct amounting to a misdemeanor, the trial court prevented appellant from impeaching the victim with the fact of the conviction. Appellant further argues that his counsel's failure to thoroughly impeach the victim rendered counsel's assistance ineffective.

As discussed below, a "use" enhancement is not part of the accusatory pleading for purposes of defining lesser included offenses. Thus, the assault with a deadly weapon charge was not a lesser included offense of the robbery. Further, sufficient evidence supported the finding that appellant personally used a knife. Additionally, the trial court properly allowed the victim to be impeached with the facts underlying his misdemeanor conviction. Moreover, appellant was not prejudiced by this form of impeachment. Accordingly, the judgment will be affirmed.

BACKGROUND

Appellant and the victim, Nathan Cisneros, had been acquaintances for several years. At approximately 3:00 a.m. one August morning appellant knocked on Cisneros's door. Cisneros, who had been watching a movie with his brother, answered. Appellant told Cisneros that he was in a hurry and needed a ride to the other side of town. Appellant explained that there were a lot of cops in the area and he did not know if they were looking

for him. After some discussion, Cisneros reluctantly agreed and retrieved a set of keys to his sister's Honda Accord.

Cisneros drove the car and appellant sat in the front passenger seat. Cisneros told appellant that he would only go to the other side of the tracks, about two and one-half blocks down the street. While they were traveling, appellant asked Cisneros to turn on the car stereo. Cisneros refused claiming that he did not have the faceplate.

After driving approximately one block, Cisneros noticed that he was being followed by a silver Honda Civic hatchback. Cisneros recognized the car as belonging to "Roland," a person he used to work with. When Cisneros looked in the rearview mirror, appellant immediately told Cisneros, "'Don't look, it's the police. Don't turn around, it's the police.'"

Cisneros was suspicious about being followed and told appellant that he was going to pull over so appellant could get into Roland's car. When Cisneros stopped the car, appellant told him to turn it off. Cisneros asked why and appellant responded, "'You know what this is about. Turn off the car.'"

Appellant then struck Cisneros in the face. A few minutes later, appellant punched Cisneros again.

Appellant's aggression escalated. He demanded that Cisneros turn off the car and give him anything that was valuable. Appellant stated, "'Pop the trunk, I'm going to take out the system. I know you have a system in here.'"

Cisneros told appellant that he could not "pop" the trunk because it had a locked latch on the side of the seat. Cisneros removed the key from the ignition and pretended that he was going to unlock the latch. When appellant exited, Cisneros tried to get away by starting the car and flooring the gas pedal. However, appellant opened the back door and jumped into the rear seat.

Appellant yelled at Cisneros to stop and punched him behind his right ear. Appellant then brought out and brandished a piece of metal and told Cisneros that if he did not stop, appellant would "shank" him, meaning stab him. Cisneros described this metal object as long and narrow in shape like a screwdriver or knife blade.

Cisneros stopped the car and the Civic pulled up behind him. Cisneros took the key out of the ignition, jumped out of the car and started running. On his way out, Cisneros grabbed a small Swiss army pocket knife and put it in his pocket. Appellant also exited the car and chased Cisneros.

At one point Cisneros fell and appellant jumped on top of him. The two struggled until Cisneros was able to get back up again and start running. Appellant chased after Cisneros carrying the knife-like metal object in his hand. Cisneros pulled out the pocket knife and said ““Don’t make me hurt you. Don’t make me stab you. I don’t want to do this”” and then continued running.

Cisneros ran to the house of a family friend and started pounding on the front door. Roland pulled up in front of the house in his Civic. Appellant backed up and Roland told him to get into the car. Roland said that he had found the faceplate to the radio in the Accord and that they should go back to take the radio out and see what else they could get.

Cisneros was let into the house and the police were called. Cisneros accompanied the officers to the Accord. The seat covers, Cisneros’s CD case, and the radio were missing. From Cisneros’s statement, the officers determined that Roland was Roland Hernandez.

At around 4:00 a.m. the officers went to Roland’s residence. Appellant was found in a closet crouching near two plastic bags that contained the missing items. Appellant and Roland were both arrested.

DISCUSSION

1. *The assault with a deadly weapon conviction was not a lesser included offense of the robbery conviction.*

Appellant argues that the offense of assault with a deadly weapon is a lesser included offense of robbery with an enhancement for the personal use of a deadly weapon. Accordingly, appellant contends that his conviction for assault with a deadly weapon must be reversed.

Penal Code section 954 provides that “[a]n accusatory pleading may charge ... different statements of the same offense” and “the defendant may be convicted of any number of the offenses charged.” Nevertheless, there is an exception to this general rule permitting multiple convictions. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) The California Supreme Court has long held that multiple convictions may not be based on necessarily included offenses. (*Ibid.*) A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

However, in *People v. Wolcott* (1983) 34 Cal.3d 92 the court held that, in the context of a trial court’s duty to instruct sua sponte on a lesser included offense, a “use” enhancement is not part of the accusatory pleading for the purpose of defining lesser included offenses. Further, as noted in *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1095, no cases to date permit the consideration of enhancements to determine lesser included offenses for any purpose. Although this issue, i.e., whether enhancement allegations should be considered in determining whether a lesser offense is necessarily included in a charged offense as pled, is currently pending before the California Supreme Court (*People v. Sloan*, S132605 and *People v. Izaguirre*, S132980), this court is bound by the ruling in *People v. Wolcott*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Robbery does not include assault with a deadly weapon as a lesser offense. (*People v. Wolcott, supra*, 34 Cal.3d at p. 100.) Thus, under current California law, appellant could properly be convicted of both offenses.

2. *The evidence was sufficient to establish that appellant personally used a knife.*

Appellant contends there was insufficient evidence to establish that he possessed and used a knife in the commission of the robbery and the assault. Appellant notes that the only evidence was presented through Cisneros’s testimony and the statements Cisneros

gave to the police. According to appellant a rational trier could not have found that Cisneros personally used a knife because Cisneros's descriptions were inconsistent, i.e., he first referred to the object as being "[i]n a screwdriver form" and later stated that it "roughly looked like a knife, a blade." Further, the investigating officer testified that Cisneros described the knife to him as a "small folding knife." Appellant also questions Cisneros's credibility.

The proper test for an insufficient evidence claim in a criminal case is whether, on the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) The record must be reviewed in the light most favorable to the judgment, drawing all inferences from the evidence that support the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.)

The reviewing court resolves neither credibility issues nor evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Conflicts and even testimony that is subject to justifiable suspicion do not justify the reversal of a judgment. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) It is the exclusive province the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*Ibid.*) To warrant the rejection of the statements given by a witness who has been believed by the jury, the testimony must be either physically impossible or inherently improbable. (*People v. Barnes, supra*, 42 Cal.3d at p. 306; *People v. Young, supra*, 34 Cal.4th at p. 1181.)

Here, Cisneros's testimony that appellant brandished a knife is neither physically impossible nor inherently improbable. Cisneros's vague descriptions of the metal object in appellant's hand do not justify rejecting the jury's finding that appellant personally used a knife. Further, it is not this court's province to rule on Cisneros's credibility. Accordingly, the evidence supports the assault with a deadly weapon conviction and the knife use enhancement.

3. *The victim, Cisneros, was properly impeached.*

Cisneros was convicted of misdemeanor receiving stolen property in 2001. Defense counsel informed the court that he would seek to impeach Cisneros with the underlying facts in that case. The court indicated that it believed Cisneros could be impeached by the conduct but not by reference to the misdemeanor conviction itself. Defense counsel did not assert otherwise.

During cross-examination, defense counsel questioned Cisneros as follows:

“Q Now, when you were in possession of stolen property back in 2001, what kind of property was that?

“A Uhm -- I believe it was a radio or something like that.

“Q A car radio?

“A Actually, yes.

“Q Was there anything else besides that?

“A Not that I can remember.”

Appellant contends the trial court erred by ruling that Cisneros could only be impeached with the conduct underlying his misdemeanor conviction and not with the fact of his prior conviction. Appellant further argues this error was prejudicial because the introduction of Cisneros’s prior misdemeanor conviction would have produced a significantly different impression of his credibility.

In *People v. Wheeler* (1992) 4 Cal.4th 284, the California Supreme Court held that a witness can be impeached in a criminal case by evidence of prior misdemeanor conduct that involves moral turpitude subject to the trial court’s discretion to exclude it under Evidence Code section 352. (*Id.* at pp. 295-297.) “Misconduct involving moral turpitude may suggest a willingness to lie.” (*Id.* at p. 295.) However, the court also held that “*a misdemeanor conviction itself* is inadmissible *hearsay* when offered as evidence that a witness committed misconduct bearing on credibility.” (*Id.* at p. 297.) Nevertheless, the

court also noted that the Legislature was not precluded from creating a hearsay exception that would allow use of misdemeanor convictions for impeachment in criminal cases. (*Id.* at p. 300.)

Thereafter, the Legislature enacted Evidence Code section 452.5. This section provides the type of hearsay exception contemplated in *Wheeler*. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) It creates an exception for certified official records of conviction that may be offered to prove not only the fact of a conviction, but the commission of the underlying offense. (*Id.* at p. 1461.) Nevertheless, as noted by the *Wheeler* court, “a witness’s prior convictions are relevant for impeachment, if at all, only insofar as they prove criminal *conduct* from which the factfinder could infer a character inconsistent with honesty and veracity.” (*People v. Wheeler, supra*, 4 Cal.4th at p. 299.)

Thus, here, a certified record of Cisneros’s misdemeanor conviction for receiving stolen property would not have been inadmissible as hearsay. However, appellant was not prejudiced by the absence of this evidence. Defense counsel elicited from Cisneros that Cisneros had been in possession of stolen property, specifically a car radio. It is this conduct, not the misdemeanor conviction based on the conduct, that impeached Cisneros’s credibility. Accordingly, even assuming error, it was harmless, i.e., it is not reasonably probable that a result more favorable to appellant would have been reached in its absence. (*People v. Zatory* (1985) 173 Cal.App.3d 390, 401.)

4. *Appellant was not denied the effective assistance of counsel.*

Appellant claims he was denied the effective assistance of counsel with respect to the impeachment of Cisneros. According to appellant, his counsel’s representation was deficient because counsel failed to request or argue that Cisneros could be impeached with the receiving stolen property conviction and failed to establish the elements of this misdemeanor offense.

Since the appellate record ordinarily does not show the reasons for defense counsel’s actions or omissions, the proper method for addressing an ineffective assistance

of counsel claim is generally by a petition for writ of habeas corpus, rather than by an appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1031.) In any event, to prevail on his ineffective assistance of counsel claim, appellant must first show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Second, appellant must show prejudice flowing from counsel's act or omission. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523.) Finally, it must also be shown that this omission was not attributable to a tactical decision that a reasonably competent, experienced criminal defense attorney would make. (*Ibid.*)

As discussed above, defense counsel elicited an admission by Cisneros that he had been in possession of a stolen car radio. It was this conduct underlying the misdemeanor conviction, not the fact of the conviction, that impugned Cisneros's integrity. Moreover, giving the jury the elements of the offense would have been relevant only to the fact of the conviction, not the facts underlying the conviction. Thus, appellant failed to demonstrate how he was prejudiced by counsel's failure to pursue impeaching Cisneros with the misdemeanor conviction.

DISPOSITION

The judgment is affirmed.

Levy, Acting P.J.

WE CONCUR:

Gomes, J.

Dawson, J.